

SEHC: Structural Options

SEHCSO 7: Incorporation Transfer

It is possible to transfer from one form of incorporation to another. The Co-operatives Act 1996 contains provisions which allow co-operatives to transfer from one legislative regime to another.

Co-operatives Act 1996: Part 12 merger, Transfer of Engagements and Winding Up Division 2 – Transfer of Incorporation:

Application for transfer

A co-operative, if approved under this Division, may apply to become registered or incorporated as one of the following bodies corporate—

a company under the Corporations Law;

an incorporated association under the **Associations Incorporation Act 1981**;

a building society under the **Financial Institutions (Victoria) Code**;

a credit union under the **Financial Institutions (Victoria) Code**;

a friendly society under the **Friendly Societies Act 1986**;

a co-operative housing society under the **Co-operative Housing Societies Act 1958**;

any body corporate that is incorporated, registered or otherwise established under a law that is a law of a place outside the State and that is prescribed for the purposes of this section.

Requirements before application can be made

Before an application is made under section 306, the co-operative must by special resolution passed by means of a special postal ballot—

approve the proposed application; and

determine under what name the co-operative is to apply to be incorporated or registered; and

adopt any memorandum or articles of association or rules that may be necessary or considered desirable.

The name applied for need not be the same as that of the co-operative and must not include the word "co-operative" or any other word importing a similar meaning.

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The Registrar may, by order, exempt a co-operative from compliance with all or specified provisions of this section and section 200 in relation to any matter to which this section applies.

An exemption under sub-section (3) may be granted unconditionally or subject to conditions.

Meaning of "new body" and "transfer"

The registration or incorporation of a co-operative as a body corporate as a result of an application under this Division is referred to in this Division as its "**transfer**" and the body corporate concerned is referred to in this Division as "**the new body**".

New body ceases to be registered as co-operative

On the transfer of a co-operative under this Division, it ceases to be registered as a co-operative under this Act.

Transfer not to impose greater liability etc.

Any memorandum or articles of association or rules adopted for the purposes of the transfer must not be such as to—

impose on the members of the new body who were members of the co-operative at the date of transfer any greater or different liability to contribute to the assets of the new body than the liability to which they were subject as members of the co-operative; or

deprive any member of the new body of any preferential rights with respect to dividend or capital to which the member was entitled as a member of the co-operative at the date of transfer.

The transfer must result in all persons who were members of the co-operative at the date of transfer becoming members of the new body.

In the case of a transfer of a co-operative that has a share capital to a new body that has a share capital, the transfer must result in every member of the co-operative at the date of transfer who held shares in the co-operative being the holder of shares in the capital of the new body equal in number and nominal value to the shares held by the member as a member of the co-operative.

Effect of new certificate of registration

A certificate of registration or incorporation as the new body issued by the appropriate officer under the law applicable to the new body is conclusive evidence that all the requirements of this Division in respect of that registration or incorporation have been complied with.

New body is a continuation of the co-operative

When a co-operative transfers to a new body, the body corporate constituted by the new body is to be considered to be the same entity as the body corporate constituted by the co-operative.

Without limiting sub-section (1), Division 6 applies to a transfer under this Division.

Stamp duty

s. 193

This section applies when a co-operative that transfers under this Division was before its registration as a co-operative under this Act a company under the Corporations Law or any corresponding previous law of the State and stamp duty had been paid on its incorporation as such a company in respect of the amount of the nominal capital of the company (or if subsequently increased on the amount of its nominal capital as so increased).

Any stamp duty so paid is to be taken into account and included in assessing the stamp duty payable on its incorporation or registration pursuant to the transfer.

The requirements for Special Resolutions are set out in Co-operatives Act 1996: Part 8 – Voting Division 2 - Resolutions

Special resolutions

A special resolution is a resolution of a co-operative which is passed—

by a two-thirds majority at a general meeting of members; or

by a two-thirds majority in a postal ballot (other than a special postal ballot) of members; or

by a three-quarters majority in a special postal ballot of members.

A special resolution may be passed by a postal ballot only if the rules of the co-operative so permit or this Act requires the special resolution to be passed by postal ballot (including a special postal ballot).

A resolution is not to be considered to have been passed as a special resolution unless not less than 21 days notice has been given to the members of the co-operative specifying—

the intention to propose the special resolution; and

the reasons for the making of the special resolution; and

the effect of the special resolution being passed.

A co-operative must give at least 28 days notice to the Registrar of a proposed special resolution before giving notice to the members of the proposed special resolution.

20 penalty units.

A failure to give notice to the Registrar under sub-section (4) does not affect the validity of the resolution.

How majority obtained is ascertained

A resolution is passed by a particular majority at a meeting if that majority of the members of the co-operative who, being entitled to do so, vote in person or (if proxies are allowed) by proxy at the meeting vote in favour of the resolution.

A resolution is passed by a particular majority in a postal ballot if that majority of the members of the co-operative who, being entitled to do so, cast formal votes in the postal ballot vote in favour of the resolution.

Disallowance by Registrar

The Registrar may disallow a proposed special resolution before it is passed by written notice to the co-operative if the Registrar is of the opinion that the effect of the special resolution if passed would be in contravention of this Act or the regulations or any other law.

Declaration of passing of special resolution

At a meeting of a co-operative for the purpose of passing a special resolution, a declaration by the chairperson of the meeting that the resolution has been passed as a special resolution is conclusive evidence of the fact.

A declaration by the returning officer for a postal ballot to pass a special resolution that the resolution has been passed as a special resolution is conclusive evidence of that fact.

Sub-section (1) does not apply if a poll is taken at the meeting of the co-operative.

Effect of special resolution

Subject to sub-section (2), a special resolution has effect from the date that it is passed.

A special resolution relating to any of the following has no effect until it is registered—

the removal of an auditor;

the expulsion of a member;

if a government guarantee applies in respect of the borrowings of a co-operative, further borrowing;

any matter for which a special resolution is required to be passed by special postal ballot.

Lodgment of special resolution

A co-operative must lodge 2 copies of each special resolution passed by the co-operative with the Registrar in accordance with this section for registration.

The copies must—

be lodged within 28 days after the passing of a special resolution or such further period as the Registrar allows; and

be signed by a director and the secretary of the co-operative;
be accompanied by the prescribed lodgment fee.

A co-operative and any officer of the co-operative that knowingly fails to lodge the required copies in accordance with this section is guilty of an offence and liable to a penalty not exceeding 20 penalty units.

This section and section 198 do not apply to a special resolution altering the rules of a co-operative.

Decision of Registrar on application to register special resolution

If the Registrar is satisfied that the co-operative has complied with the provisions of this Act and the regulations, and that the resolution is not contrary to this Act or the regulations, the Registrar must register the resolution.

If the Registrar is of the opinion that the effect of a special resolution lodged for registration would be in contravention of this Act or the regulations or any other law, the Registrar may—

refuse to register the special resolution; and

give written notice to the co-operative that the special resolution—

has no effect, in the case of a special resolution referred to in section 196(2); and

has no effect as from the date that it was passed, in any other case.

A certificate of registration of a special resolution given by the Registrar is, in favour of any person advancing money to the co-operative on the faith of the certificate or in favour of any guarantor of that advance, conclusive evidence that the resolution was duly passed.

Division 3—Postal ballots

Postal ballots

A postal ballot may be held as provided by the rules of a co-operative and must be conducted in accordance with the regulations.

On the declaration by the returning officer of the result of the ballot, the secretary of the co-operative must make an entry in the minute book of the co-operative showing—

the number of formal votes cast in favour of the proposal concerned; and

the number of formal votes cast against the proposal; and

the number of informal votes cast.

Words: 1721

Date: 21 February 2006